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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2020AP976-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AVERY B. THOMAS, JR.,

Defendant-Appellant.

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On Appeal of a Judgment of Conviction and Order  
Denying Postconviction Relief Entered in the  
Racine County Circuit Court, the Honorable Wynne  
P. Laufenberg, Presiding.

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BRIEF AND APPENDIX OF  
DEFENDANT-APPELLANT

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### **ISSUE PRESENTED**

1. Is Mr. Thomas entitled to 48 days of additional sentence credit for time that he remained in federal custody based on a federal supervised release hold that was imposed in part due to his criminal conduct in this case?

The circuit court answered no.

### **POSITION ON ORAL ARGUMENT AND PUBLICATION**

Mr. Thomas requests neither oral argument nor publication as this case can be resolved based on well settled legal principles.

### **STATEMENT OF THE CASE AND FACTS**

On February 23, 2018 the State charged Avery B. Thomas, Jr. with nine drug crimes, including four charges for delivering heroin, one for delivering cocaine, one for keeping a drug trafficking place, and three charges for possessing a narcotic drug, cocaine, and THC. (1:1-4). The complaint alleged that Mr. Thomas delivered drugs to a police informant on four separate dates in January and February 2018, and when he was arrested for these offenses he was in possession of heroin, cocaine and marijuana. (1:5-6).

Mr. Thomas was arrested and held in custody on those charges on February 21, 2018. (1:5-6; 42:14). On February 23, 2018, Mr. Thomas made his initial appearance on this case and \$10,000 cash bail was

ordered and Mr. Thomas was never able to post that bail. (28:4; 42:12-13). At the time, Mr. Thomas was on supervised release from a federal sentence and on February 27, 2018, a warrant was entered for his arrest in that case, in part for Mr. Thomas' illegal conduct in this case. (24:8, 16).

On February 15, 2019, Mr. Thomas pled guilty to five of the charges, including two counts of delivering heroin, one count of delivering cocaine, one count of possessing a narcotic drug, second and subsequent offense, and one count of possessing cocaine, second and subsequent offense. (40:17-18).

Before sentencing, on April 1, 2019, the court modified Mr. Thomas' bail from \$10,000 cash to a \$10,000 signature bond. (15). However, Mr. Thomas was never released from custody because of his federal revocation hold. (41:2; 24:16-17). On May 20, 2019, Mr. Thomas was sentenced in his federal case for violating the terms of his supervised release and he began serving that sentence. (24:8-9, 17-18).

On June 10, 2019, Mr. Thomas was sentenced in this case, the Honorable Wynne P. Laufenberg, presiding. The court ordered Mr. Thomas to serve a total sentence of 14 years prison, bifurcated as 7 years of initial confinement followed by 7 years of extended supervision, to be served concurrent with the sentence in his federal case. (42:26-27). The court awarded 403 days of pre-trial sentence credit for the period between Mr. Thomas' arrest in this case on February 21, 2018 and when it ordered his bail converted to a signature bond on April 1, 2019. (21:3; App. at 103). As to the custody period between April

2, 2019 and Mr. Thomas' federal sentencing, the court stated that it was not awarding sentence credit because Mr. Thomas was on a signature bond in this case during that time and it was not the court's concern that federal authorities chose not to release him. (42:27).

On March 13, 2020, Mr. Thomas filed a postconviction motion seeking 50 days of additional sentence credit. (24). The motion first alleged that the period between Mr. Thomas' arrest on February 21, 2018, and when the signature bond was ordered on April 1, 2019, actually represented 405 days, and thus he was entitled to 2 extra days for that period of time. (24:4). The motion also sought sentence credit for the period between April 2, 2019, and May 20, 2019, when Mr. Thomas was sentenced in his federal case, a period of 48 days. (24:4-5).

On April 14, 2020, in a written decision and order, the circuit court granted Mr. Thomas' request for two additional days of sentence credit for the period from February 21, 2018 to April 1, 2019. (25:2; App. at 105). The court denied Mr. Thomas' request for an additional 48 days of credit for the period from April 2, 2019, to May 20, 2019, because he was on a signature bond in this case and was being held only on a federal hold for violations of his federal supervised release. (25:2; App. at 105). The court reasoned that Wis. Stat. § 973.155(1)(b) only applied to state holds. (25:2; App. at 105).

Mr. Thomas now appeals.

## ARGUMENT

**I. Mr. Thomas is entitled to 48 additional days of sentence credit for the time that he was in custody on a federal supervised release hold that was based in part on his conduct in this case.**

Wis. Stat. § 973.155(1)(a) requires that a convicted offender “shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed.” *State v. Beets*, 124 Wis. 2d 372, 376, 369 N.W.2d 382 (1985).

Awarding sentence credit is a matter of equal protection and “is designed to afford fairness so that a person does not serve more time than that to which he or she is sentenced.” *State v. Obriecht*, 2015 WI 66, ¶ 23, 363 Wis. 2d 816, 867 N.W.2d 387. Sentence credit must be awarded if: (1) the defendant was in custody for the period under consideration, and (2) that custody was “in connection with the course of conduct for which sentence was imposed.” *Id.*, ¶ 25.

With regard to the first question, a person is “in custody” if they could be charged with escape if they leave the place of detention. *Id.* As to the second question, “[t]o qualify as time spent ‘in connection with’ the course of conduct giving rise to a sentence, a period of custody must be ‘factually connected with the course of conduct for which sentence was imposed.’” *State v. Zahurones*, 2019 WI App 57, ¶ 14, 389 Wis. 2d 69, 934 N.W.2d 905 (internally quoted authority omitted).

Thus, the Wisconsin Supreme Court stated that “[t]he clear intent of sec. 973.155, Stats., is to grant credit for each day in custody regardless of the basis for the confinement as long as it is connected to the offense for which sentence is imposed.” *State v. Gilbert*, 115 Wis. 2d 371, 380, 340 N.W.2d 511 (1983).

Applying Wis. Stat. § 973.155 to a particular set of facts is a question of law that this Court reviews independently. *Zahurones*, 389 Wis. 2d 69, ¶ 12. However, any factual findings made by the circuit court will be upheld unless clearly erroneous. *Id.*

Here, Mr. Thomas remained in custody from April 2, 2019, to May 20, 2019,<sup>1</sup> on a federal supervised release hold that was in place as a result of his criminal conduct in this case. (24:8, 16-17). This represents a period of 48 days. Mr. Thomas is entitled to these days as sentence credit because he was in actual physical custody during this period and that custody was “factually connected” with the course of conduct for which sentence was imposed in this case. That factual connection exists because Mr. Thomas’s federal supervised release hold was based in part on his criminal conduct from this case. Therefore, he is entitled to 48 additional days of sentence credit.

The circuit court denied Mr. Thomas sentence credit for these additional days because Mr. Thomas was on a signature bond in this case during that

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<sup>1</sup> Once Mr. Thomas was sentenced in his federal case, that action severed the connection between his custody in both cases. Therefore, he is not entitled to any sentence credit after May 20, 2019. *See Beets*, 124 Wis. 2d 372.



time. This is irrelevant. As the *Gilbert* Court stated, the basis for the confinement does not matter; what matters is that the confinement was connected to the offense for which sentence was imposed. *State v. Hintz*, 2007 WI App 113, ¶ 11, 300 Wis. 2d 583, 731 N.W.2d 646 (holding a defendant is entitled to sentence credit for time in custody on a supervision hold, even when released on bond in the case where credit was granted). As just noted, that connection exists because the federal hold was partly due to Mr. Thomas' conduct from this case.

Additionally, the purpose of sentence credit is to ensure that a defendant does not serve more time than that to which he is sentenced. Here, Mr. Thomas was sentenced to a term of imprisonment in the state prison system, to run concurrent with his sentence in his federal case. Therefore, the time that he was held in custody pre-trial in either case should be credited to both cases.

The circuit court also denied Mr. Thomas' request for the additional 48 days of credit, finding that Wis. Stat. § 973.155(1)(b) only applies to probation, extended supervision, or parole holds that are imposed under state authority.<sup>2</sup> (25:2; App. at 105). But paragraph (b) does not *exclude* types of pretrial custody from eligibility for sentence credit. It is expressly a non-exhaustive list of situations where

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<sup>2</sup> Wis. Stat. § 973.155(1)(b) reads: "The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision, or parole hold under s. 302.113(8m), 302.114(8m), 304.06(3), or 973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction."

sentence credit is required “includ[ing]” state supervision holds. Just because the statute expressly authorizes sentence credit under a specific factual scenario that reoccurs frequently, does not mean that an offender in Mr. Thomas’ position is not entitled to sentence credit under a different factual scenario. Thus, instead of ending its analysis with Wis. Stat. § 973.155(1)(b), the circuit court should have looked further to the *Obrieht* test to resolve the issue. As noted above, application of that test leads to the conclusion that Mr. Thomas is entitled to the additional 48 days of credit.

Furthermore, while Wis. Stat. § 973.155(1)(b) does not expressly list a federal supervision hold, the legal principles codified there should serve as guidance in fairly resolving this credit issue. Sentence credit must be awarded “for time in custody on a State supervision hold if the hold was *at least in part* due to the conduct resulting in the new conviction.” *Hintz*, ¶ 8 (emphasis added). The defendant is entitled to the sentence credit even if they were on a signature bond on the new case and being held only on the extended supervision hold. *Id.*, ¶ 11. Thus, if Mr. Thomas’ supervision hold had been imposed under state authority, he would undoubtedly be entitled to the additional credit because it is specifically required by Wis. Stat. § 973.155(1)(b). Given the similarities of Mr. Thomas’ situation to a defendant who is on a state supervision hold, fairness dictates that they should be treated equally. Thus, Mr. Thomas should be awarded the additional credit that he seeks.

Regardless, in order to determine if Mr. Thomas is entitled to the credit, the court must look to the *Obriecht* test. As noted, application of that test dictates that Mr. Thomas must be awarded 48 additional days of sentence credit for the period he remained in custody from April 2, 2019 to May 20, 2019.

### CONCLUSION

Mr. Thomas respectfully requests that this Court reverse the circuit court's decision denying him credit from April 2, 2019 to May 20, 2019 and order 48 days of additional sentence credit in this case for a total of 453 days of credit.

Dated this 25<sup>th</sup> day of August, 2020.

Respectfully submitted,

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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,835 words.

### **CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25<sup>th</sup> day of August, 2020.

Signed:

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JAY PUCEK

Assistant State Public Defender

### **CERTIFICATION AS TO APPENDIX**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25<sup>th</sup> day of August, 2020.

Signed:

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## **APPENDIX**

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